Opinion of Advocate General Szpunar of 24 February 2022, Case C-501/20 – M P A v L C D N M T, on the concept of 'habitual residence' for Regulation (EC) No 2201/2003, Regulation (EC) No 4/2009, and the impact of Article 47 of the EU Charta on Fundamental Rights

Today, Advocate General Maciej Szpunar delivered his Opinion in the above mentioned case on the concept of „habitual residence" under Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as well as under Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, as well as impacts of Article 47 of the EU Charta on Fundamental Rights in relation to a *forum necessitatis* as referred to in Article 7 of Regulation No 4/2009.

Opening by a quote from the General Course of 1986 by Paul Lagarde for the Hague Academy of International Law „ 'The principle of proximity … is nearest to life and is a title of nobility. It carries with it a lesson in modesty by teaching us that no political will, no judge, however pure his or her intention, can claim jurisdiction, in the long term, to rule according to his or her laws on life relationships that are outside his or her discretion.', the Opinion results, after careful deliberation, in the following elements for a concept of „habitual residence":

„1. The spouses' status as contract staff of the European Union in a third State is not a decisive factor in determining the place of habitual residence, whether in the meaning of Articles 3 and 8 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, or Article 3 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

2. It is not possible, for the purposes of determining the children's place of habitual residence, within the meaning of Article 8 of Regulation No 2201/2003, only to take into consideration criteria such as the mother's nationality, the fact that she resided in a Member State before her marriage, the nationality of the minor children and their birth in that Member State.

3. With regard to the application for divorce, if the court seised cannot establish its jurisdiction on the basis of Articles 3 to 5 of Regulation No 2201/2003, Article 6 of that regulation then precludes the application of the residual clause contained in Article 7(1) of that regulation and, consequently, the defendant – a national of a Member State – can be sued only before the courts of that Member State.

So far as concerns parental responsibility, if the court seised does not have jurisdiction under Articles 8 to 13 of Regulation No 2201/2003, Article 14 of that regulation applies regardless of the children's place of habitual residence and the nationality of the defendant.

4. Article 7 of Regulation No 4/2009 must be interpreted as meaning that the state of necessity may result from exceptional, very serious or emergency situations such that proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected. Those conditions are met, in particular, when the court of the third State with which the dispute is closely connected refuses to exercise jurisdiction or there are abusive procedural requirements, when, due to civil unrest or natural disasters, it is dangerous to go to certain places and the third State's normal activity is affected, and, lastly, when access to justice is unduly hampered, in particular when legal representation is prohibitively expensive, when the length of

proceedings is excessively long, when there is serious corruption within the judicial system, or when there are failures concerning the fundamental requirements for a fair hearing or systemic failures. The parties are not required to demonstrate that they initiated or attempted to initiate proceedings in that State with a negative result.

5. Articles 7 and 14 of Regulation No 2201/2003, relating to subsidiary jurisdiction in matters of divorce, legal separation or marriage annulment respectively, and Article 7 of Regulation No 4/2009, with regard to the *forum necessitatis* in matters relating to maintenance, must be interpreted by the court seised in the light of Article 47 of the Charter. National rules on residual jurisdiction, including those relating to the *forum necessitatis*, must be applied in the light of that same article."

These findings have emerged from a reference by the Audiencia Provincial de Barcelona (Provincial Court, Barcelona), by judgment of 15 September 2020, in which no less than six rather detailed questions were raised (para.) 26, with a view to the following facts (paras. 17 et seq.):

„17. M P A, a citizen of Spanish nationality, and LC D N M T, a citizen of Portuguese nationality, were married on 25 August 2010 at the Spanish Embassy in Guinea-Bissau. They have two minor children, born on 10 October 2007 and 30 July 2012 in Manresa (Barcelona, Spain). The children have dual Spanish and Portuguese nationality.

18. The spouses lived in Guinea-Bissau from August 2010 to February 2015 and then moved to Lomé (Togo). Following their de facto separation, in July 2018, the applicant in the main proceedings and the children continued to reside in the marital home in Togo and the spouse resided in a hotel in that country.

19. The spouses are both employed by the European Commission as contract staff of the European Union in its delegation in Togo. The referring court states that contract staff – servants of the European Union in the EU Member States – have the status of diplomatic staff of the European Union only in the country of employment.

20. On 6 March 2019, the applicant in the main proceedings brought an application before the Juzgado de Primera Instancia de Manresa (Court of First Instance, Manresa, Spain) for divorce and sought the dissolution of the

matrimonial property, the determination of the regime and procedures for exercising custody and parental responsibility over the minor children, the grant of a maintenance allowance for the children and rules for the use of the family home in Lomé. She also requested the adoption of interim measures.

21. The defendant in the main proceedings claimed that the Juzgado de Primera Instancia de Manresa (Court of First Instance, Manresa) did not have international jurisdiction. By order of 9 September 2019, the court declared that it lacked international jurisdiction to hear the case on the ground that the parties were not habitually resident in Spain.

22. The applicant in the main proceedings brought an appeal against that decision before the referring court. She claims that both spouses enjoy diplomatic status as accredited servants of the European Union in the country of employment and that this status extends to the minor children.“